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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 194

FEDERAL TRADE COMMISSION, PETITIONER

v.

R. F. KEPPEL & BROTHER, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Third Circuit (R. 371) is reported in 63 F. (2d) 81; the dissenting opinion of Judge Woolley (R. 376) begins at p. 83.

JURISDICTION

The decree of the Circuit Court of Appeals setting aside the order of the Commission was entered January 25, 1933. (R. 383.) Petition for certiorari was filed June 21, 1933, and was granted October 9, 1933. (R. 386.)

Jurisdiction of this Court rests on Section 5 of the Federal Trade Commission Act, c. 311, 38 Stat. 717, 719 (U.S.C., Title 15, Sec. 45), and Section 240(a)

of the Judicial Code as amended by the Act of February 13, 1925. *Federal Trade Commission* v. *Royal Milling Company*, 288 U.S. 212.

QUESTIONS PRESENTED

The principal question presented is whether the method of competition involved in the sale of assortments of candy so arranged that they may be resold to children in a manner involving lot or chance is "unfair" within the meaning of Section 5 of the Federal Trade Commission Act, where it appears that the sale of such assortments diverts trade from competitors who do not use lottery devices.

The questions (1) whether the methods complained of are methods of competition, and (2) whether the Commission's action is in the public interest, will also be considered.

STATUTE INVOLVED

The relevant portion of Section 5 of the Federal Trade Commission Act is set forth in the Appendix, pp. 43–46, *infra*.

STATEMENT

As indicated in our petition for a writ of certiorari, this is in the nature of a test case [1] intended to determine whether the Federal Trade Commission may, upon proper facts, find that the use of lottery devices in connection with the sale of goods in interstate commerce is an unfair method of competition within the

[1] The Commission has issued 64 complaints against other candy manufacturers, charging them with using similar methods of sale.

meaning of Section 5 of the Federal Trade Commission Act. The particular facts here involved concern the sale by respondent, to wholesalers or retailers, of so-called penny candies so arranged in packages that the ultimate consumer, usually a child, if he makes a fortunate selection, wins a premium or prize. The evidence shows that the use of lottery devices in connection with sales of candy diverts trade from those competitors who decline to sell lottery packages because they are intended to appeal to the gambling instincts of children, or because the use of lottery devices is generally prohibited by law in this country, or because the use of such devices is regarded as injurious to the candy business. The Commission decided that the use of lottery devices by respondent in aid of the sale of its penny candies is an unfair method of competition, and it ordered the respondent to cease and desist from employing such devices.

The Commission instituted its proceedings by the issuance of a complaint (R. 2–7), to which respondent answered (R. 8–9). An examiner was appointed to take testimony (R. 10). Upon the record made before the examiner, the Commission made its findings of fact and conclusion (R. 12–24) which may be briefly summarized as follows:

Respondent, a corporation with its principal place of business in Lancaster, Pa., has been engaged for more than five years [2] in the manufacture of candy

[2] The testimony indicates that it has been in the business of manufacturing candy since 1918. (R. 31.)

and the sale of candy in interstate commerce to wholesalers, jobbers, and retailers, in active competition with other concerns similarly engaged. (Par. One, R. 13.) The entire manufacturing business of respondent for the year ending June 30, 1930, amounted to approximately $391,000; in addition to its manufacturing business, respondent conducts a jobbing department through which it distributes to retailers the products of other candy manufacturers. (Par. Fifteen, R. 23.) Its business to the extent of 60% consists of sales of "break and take" assortments, i.e., assortments with lottery features, as distinguished from "straight goods", or candy sold without gaming, prize or lottery features. (Pars. Six, Fourteen, R. 17, 23.) The following assortments of "break and take" penny candy are being sold by respondent:

(1) "*Chocolate Penny Men*"—120 pieces of chocolate covered cream candy, each moulded into the shape of a man, are packed in a box. In 4 of the pieces a penny is concealed, so that the purchaser who happens to select one of these 4 pieces receives his penny back and obtains the piece of candy free of charge. A display card accompanying the package (Commission's Exhibit 2, R. 351) displays a picture of a boy and bears the label, "Watch this Boy, He Has Money in His Pockets."[3] (Par. Two, R. 13–14.)

[3] The ultimate purchaser has no means of determining how many of the pieces contain pennies, and he does not know, therefore, what his chances are of receiving his penny back.

(2) *"1, 2, 3 Big Chief 60s"*—60 peanut bars, uniform in size and quality, are packed in a box. An accompanying display card (Commission's Exhibit 5, R. 357) indicates that 10 bars sell at one cent each, 10 at 2 cents each, and 40 at 3 cents each.[4] Each peanut bar is contained in a nontransparent wrapper in which also is concealed a ticket indicating the retail price of that bar. Thus the price of a bar cannot be ascertained until after purchase, when the wrapper is removed. (Par. Three, R. 14–15.)

(3) *"School Days 200"*—200 small chocolate cream candies are packed in a box. The box contains in addition 20 chocolate-covered pieces of candy, 8 of which are moulded into the shape of a boy, 8 into the shape of a girl, and 4 are double pieces called "twins." The box also contains a "School Companion", i.e., a container with school supplies, such as pen, pencils, etc., 16[5] of the small chocolate cream candies have pink centers, 4 have chocolate centers, and the remaining 180 have white centers. A display card accompanying this assortment (Commission's Exhibit 9, R. 365) bears the legend: "One piece of cream with white center, one cent; one piece of cream with pink center and school boy or girl, one cent; one piece of cream with chocolate center and set of twins,

[4] Formerly this assortment contained three bars which could be obtained free, five bars at one cent each, five bars at three cents each, five bars at four cents each, and twenty-two bars at five cents each. (Par. Four, R. 15–16.)

[5] In the opinion of the court below this number is inadvertently given as "8." (R. 372.)

one cent; last piece of cream and school companion, one cent."[6] (Par. Five, R. 16–17.)

The purchaser never knows prior to purchase whether he will win any premium or prize. The Commission found in each case, therefore, that what the purchaser receives, or the price he will pay, depends upon lot or chance. (R. 14, 15, 17.)

Respondent has knowledge that its "break and take" candy will be resold to the purchasing public by retail dealers by lot or chance, and it is for this reason that it packs and assembles the candy in the manner described. (Par. Eight, R. 18.)

There are in the United States a large number of manufacturers of candy who manufacture and sell "break and take" candy of the same general character as that produced by respondent, and their product is sold in direct competition with "straight" penny goods and five cent bars. The pieces of candy in the "break and take" packages are either smaller in size than the corresponding pieces of "straight goods" candy, or the quality of the candy in the "break and take" packages is poorer than that in the "straight goods" assortments. Respondent sells "straight goods" which is of the same quality as its "break and take" candy but the pieces are larger in size. This difference in size or quality is necessary in order to compensate for the value of the prizes or

[6] No indication is given to the ultimate purchaser of how many of the cream candies have white, how many have pink, and how many have chocolate centers, and he does not know, therefore, what his chances are of winning a prize piece.

premiums which are distributed with the "break and take" goods. The purchaser of a piece of candy from a "break and take" package does not receive the same value for his money that he would if he purchased a piece of candy from a "straight goods" package, unless he wins a premium or prize, in which case the value of what he receives is greatly in excess of the value of a "straight goods" piece of candy. (Pars. Eleven, Twelve, R. 20–22.)

There are in the United States many manufacturers of candy who do not manufacture and sell lottery or prize packages of candy, but who sell their "straight goods" candy in interstate commerce in competition with the "break and take" packages of respondent and other manufacturers of similar candy. The sale of "straight goods" is adversely affected by the sale of "break and take" candy, and manufacturers of the former type of candy have noted a marked decrease in the sales of their products whenever and wherever the lottery or prize candy has appeared in their markets. This decrease in the sale of "straight goods" candy is principally due to the gambling and lottery features connected with the "break and take" candy. Children, who are the principal purchasers of penny candy, purchase the candy which offers a chance to win a prize or premium, irrespective of differences in size or in quality. (Par. Thirteen, R. 22.)

The principal demand in the trade for the "break and take" candy comes from the small retailers, whose stores are in many instances located near

schools and attract the trade of school children. Because of the lottery or gaming feature connected with the "break and take" package, and the possibility of winning a prize or premium, it has been observed that children purchase "break and take" candy in preference to "straight goods" when the two types of packages are displayed side by side. (Par. Ten, R. 20.)

Respondent manufactured and sold "break and take" packages of candy prior to 1925. In that year it discontinued the sale of this type of candy and sold only "straight goods" for a time, during which its business showed a decided decrease in volume and profits, and it resumed the sale of "break and take" packages. During the time that it did not manufacture "break and take" candy, many of its competitors were continuing to do so, and respondent considered it necessary to resume the manufacture of that candy in order to meet the competition of others, and to make a profit in its business. (Par. Fourteen, R. 22–23.)

The sale and distribution of "break and take" candy by the retailers is a sale and distribution of candy by lot or chance and constitutes a lottery or gaming device. (Par. Nine, R. 18.) The sale and distribution of candy by lot or chance is against the public policy of many of the States of the United States and some of said States have laws making the use of lotteries and gaming devices penal offenses. (Par. Sixteen, R. 23.)

Paragraph Nine of the Commission's findings is in part as follows (R. 19):

> Competitors of respondent appeared as witnesses in this proceeding and testified, and the Commission finds as a fact, that many competitors regard such method of sale and distribution as morally bad and encouraging gambling, especially among children; as injurious to the candy industry, because it results in the merchandising of a chance or lottery instead of candy; and as providing retail merchants with the means of violating the laws of the several states. Because of these reasons some competitors of respondent refuse to sell candy so packed and assembled that it can be resold to the public by lot or chance. These competitors are thereby put to a disadvantage in competing. The retailers finding that they can dispose of more candy by the "Break and Take" method, buy from respondent, and others employing the same methods of sale, and thereby trade is diverted to respondent, and others using similar methods, from said competitors. Said competitors can compete on even terms only by giving the same or similar devices to retailers. This they are unwilling to do, and their sales of "Straight Goods" candy show a continued decrease. * * * The use of such methods by respondent in the sale and distribution of its candy is prejudicial and injurious to the public and its competitors, and has resulted in the diversion of trade to respondent from its said competitors, and is a restraint upon and a detriment to the free-

> dom of fair and legitimate competition in the candy industry.

The Commission concluded that the acts and practices of respondent complained of, under the conditions and circumstances set forth in its findings of fact, "are all to the prejudice of the public and respondent's competitors, and constitute unfair methods of competition in commerce" in violation of Section 5 of the Federal Trade Commission Act. (R. 24.) The Commission accordingly issued its order to cease and desist against respondent. (R. 25–28.)

Upon respondent's petition to the court below to review the order of the Commission (R. 333–345), the court decided, after hearing, Judge Woolley dissenting, that the Commission's order should be set aside. (R. 371–376.) The following, taken from the opinion of the court (R. 375), indicates the grounds of its decision:

> The petitioner did nothing against public policy, within the restricted sense of the term, because its acts did not, of themselves, tend to hinder competition nor create monopoly. Whatever they did, their competitors could do. * * *
>
> The answer to the contention that the petitioner's practices constitute a breach of good morals, and, in that respect, unfair methods of competition, is that there is nothing in the case to show deception, fraud, or bad faith affecting its competitors or the ultimate consumer.

The court below did not question the sufficiency of the evidence to support the Commission's findings. We deem it desirable, however, to refer to a part of the testimony of an officer of respondent, and to summarize briefly the testimony in the record with respect to competitive conditions in the industry.

The treasurer and vice-president of respondent was called by the Commission. He testified that the respondent commenced to manufacture candy in 1918. (R. 31.) In the year preceding the taking of testimony, the company's manufacturing business totalled $391,000, of which 60% consisted of sales of "break and take" candy. (R. 63.) The percentage of its sales of "break and take" candy as compared with its "straight goods" had been increasing. (R. 62–63.)

Several years ago respondent ceased to manufacture "break and take" candy for a period of 6 or 8 months, as a result of a movement in the industry in that direction, the origin of which the witness could not recall. (R. 66, 67, 69.) There were manufacturers who "didn't look with favor on this type of merchandise." (R. 88.) Respondent was "very glad to go along and quit." (R. 85.) However, some manufacturers continued to sell "break and take" packages and new ones started to do so, and respondent "felt that it was necessary in our business to begin again, as long as the others hadn't stopped." (R. 67.)

In 1926, on account of "the activities of the National Confectioners' Association in stopping the sale of these particular packages," respondent severed its

membership in the Association. (R. 81, 85.) The basis of the Association's action was the objection made by those manufacturers who did not sell "break and take" candy, but the witness could not recall the grounds of that objection. (R. 86–87.) Respondent would have had no objection to discontinuing the manufacture of "break and take" candy if the efforts of the Association had been successful and all manufacturers had discontinued it. (R. 82.) The witness indicated that respondent would be willing to discontinue the "break and take" package now, if the whole industry did likewise. (R. 88.)

In addition to this officer of respondent, the Commission called 16 witnesses, 9 of whom were representatives of competitors [7] of respondent (R. 89, 120, 200, 228, 238, 258, 274, 303, 311), the remaining 7 being candy salesmen, jobbers, and retailers. Respondent called no witnesses. (R. 331, 332.) Of the 9 representatives of competitors all but one testified that they did not sell "break and take" candy (R. 90, 202, 231, 240, 265, 276, 304, 313). Each of them testified that his business was adversely affected by sales of such candy. (R. 94–95, 104, 205, 233, 241, 244, 256, 261, 269, 277, 284, 305–306, 313, 315, 323.) The president of a company that has been in

[7] These competitors were: Allen & Smith Co., Richmond, Va.; George Close Co., Cambridge, Mass.; Fair Play Caramels Corporation, Johnson City, N.Y.; Henry Heide, Inc., New York, N.Y.; Charles N. Miller Co., Boston, Mass.; National Licorice Co., Brooklyn, N.Y.; New England Confectionery Co., Cambridge, Mass.; Voneiff-Drayer Co., Baltimore, Md.; York Caramel Co., York, Pa. They are competitors because they sell penny candy in the same markets. (R. 231, 241, 265, 270, 320–321.)

the business for over 50 years testified that since the introduction of "break and take" candy his penny goods business has been cut down as much as 50% (R. 277.) Furthermore, because he does not sell lottery goods some of his former customers purchase their entire candy needs from competitors who do have such goods. (R. 277, 283.) Others testified to the same effect. (R. 133–134, 174.) A witness who has been treasurer and general manager of his company for 13 years testified that the effect of sales of "break and take" candy "has been a very serious one from the time that this type of package first came on the market." (R. 305.) "We found," he stated, "that as our salesmen attempted to sell our own penny manufactures they were constantly being crowded for this type of package which we refused to make. The result was that our sales were lowered in favor of the manufacturer who was putting out this type of package." (R. 306.) The matter was summed up by this witness thus (R. 310–311):

> we do not have an equal opportunity, because it is inborn in the child, the desire to gamble. The child is undoubtedly going to play at this game if the opportunity is offered. We are competing with other manufacturers for that child's penny that he has to spend. There is an element in this that we refuse to put into our package which is attractive to the child, and therefore we are at a distinct disadvantage.

The salesmen and brokers also testified to the adverse effect of lottery packages on sales of straight

goods. (R. 164–165, 173–174, 176, 219–220, 328–329.) It appeared in evidence that of 450 members of the National Confectioners Association,[8] 70, or 15%, did not sell lottery packages. (R. 324.)

It is apparent from the record that of the large number who manufacture lottery packages, some of them would prefer not to produce such packages, but find it necessary to do so in order to meet the competition of others who sell them. One competitor of respondent testified that in 1924, as a result of pressure brought to bear by the National Confectioners Association, his company ceased to manufacture such products, but after several months was compelled for competitive reasons to commence to make them again. (R. 126–127.) Further pressure by the Association once more resulted in the cessation of their manufacture in 1927, "and we just had a duplication of what we had in '24 and '25; so then we started up again." (R. 127, 154–155.) At a meeting of penny goods manufacturers, out of 45 persons present, 40 indicated that they were manufacturing lottery packages "in self-defense." (R. 323.) A candy jobber testified that in his opinion 90% of the jobbers would be glad "to see the 'break and take' business stopped." (R. 177.)

Those who decline to produce "break and take" packages refrain from doing so because of the illegality involved in the use of lottery devices (R. 202, 234, 242, 277, 310, 313, 318); also because it is deemed undesirable to encourage gambling by chil-

[8] The record does not indicate what portion of the entire industry is represented by this association.

dren (R. 90–91, 102–103, 231, 278, 307); and because of the resulting tendency to substitute competition in gambling devices for competition in the sale of candy. (R. 91, 183–184, 266, 306.) One witness who emphasized the illegal character of "break and take" products testified that in his opinion packages of that type are both unethical and illegal; that his company would not do anything that was illegal or unethical; and that he believed that packages of that type are contrary to the laws of numerous States and municipalities. (R. 242.) A witness, testifying as to the effect of such sales on children, stated that his products are sold almost entirely to children, and he did not think it wise to cultivate the gambling instinct in the younger children. (R. 307.) Other witnesses testified that sales of penny candies are made principally to children. (R. 126, 214.)

The testimony was unanimous that "break and take" candy is uniformly either smaller sized per piece, or of poorer quality, than straight goods. (R. 116–117, 128, 147, 150, 187, 206, 215.) Respondent's "break and take" candy is smaller in size than its straight goods. (R. 63, 65.) Testifying as to the effect on sales of the difference in value between "straight goods" and "break and take" candy, a witness stated (R. 244):

> I would say that the gambling instinct in children is even stronger than reason. Reason would prompt them to take the better value for every penny that they spend, but the gambling instinct prompts them to try to get something for nothing.

A retailer testified (R. 110):

> Some of them don't care anything about the prize. I have seen them take it. They like to win. I have seen children who had plenty of money, you know, who get the prize and hand it over to another child. They like the game. It is the game that is the thing they like. It is the same as a game of gambling. I don't know. Anything that is fascinating they like to gamble on it.

Several other witnesses testified to the effect that the gambling element involved lures the child into purchasing the "break and take" candy. (R. 91, 94–95, 116, 130, 131, 327.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that respondent's practices do not tend to hinder competition.

(2) In holding that respondent's competitors were not injured because they could use the same sales methods.

(3) In holding that a sales plan in which the traders employing it do not compete on the basis of quality, quantity or price, but which introduces a lottery or gaming device to enable them to sell their goods, is not an unfair method of competition.

(4) In holding that a sales plan which induces a consumer to purchase an article smaller in size or inferior in quality to similar competing articles because of a chance to win a prize or premium, without advising the purchaser that the article is smaller in

size or inferior in quality, is not a deceptive plan, and therefore an unfair method of competition.

(5) In holding that a sales plan which provides retailers with a means by which they violate the lottery laws of their respective States, and which forces competitors, in order to compete on even terms, to become originators of devices and participants in plans whereby State laws are violated, is not an unfair method of competition.

(6) In holding that, upon the findings of fact and conclusion of the Commission, the cease and desist order entered was not within the jurisdiction of the Federal Trade Commission.

(7) In setting aside the cease and desist order of the Federal Trade Commission.

SUMMARY OF ARGUMENT

I. The method of competition involved in the sale by respondent of "break and take" candy is "unfair" within the meaning of Section 5 of the Federal Trade Commission Act. The words "unfair methods of competition" are not to be limited to any particular class of competitive practices. It is apparent from the legislative history of Section 5 that they were selected by Congress for the express purpose of providing a broad, flexible, all-inclusive standard. The decision of this Court in *Federal Trade Commission* v. *Gratz*, 253 U.S. 421, was not intended to hold to the contrary; this is shown by the decision in *Federal Trade Commission* v. *Raladam Company*, 283 U.S. 643, where this Court stated (p. 648) that the phrase

"unfair methods of competition" belongs to that class of phrases the meaning and application of which must be arrived at by the "gradual process of judicial inclusion and exclusion." The Commission is, therefore, not limited by precedent in considering whether a particular practice constitutes an unfair method of competition within the meaning of the Act. It must consider each case upon its facts, and this Court will ultimately determine, upon the facts found by the Commission which are supported by evidence, whether the Commission was justified in concluding that the practices complained of fall within the statute. *Federal Trade Commission* v. *Beech-Nut Packing Company*, 257 U.S. 441, 453.

It is not contended that every practice which business men may regard as unethical is rendered unfair by Section 5. *Federal Trade Commission* v. *Sinclair Refining Company*, 261 U.S. 463, 475–476; *Northam Warren Corporation* v. *Federal Trade Commission*, 59 F. (2d) 196, 198 (C.C.A. 2d). But the sale by respondent of "break and take" candy does not involve merely a question of business ethics or good business manners; it is a reprehensible practice.

The reasons why some competitors decline to sell "break and take" packages are: (1) that the principal sales virtue of the "break and take" method of selling candy is in its appeal to the gambling instincts of children, and the method is, therefore, calculated to take unfair advantage of children; (2) that the sale of candy by the retailer by the "break and take" method is a sale by lot or chance and is in violation

of the lottery statutes of the several States; and (3) that the use of lottery devices in the sale of candy is injurious to the industry, because it tends to bring about competition in lottery devices rather than in candy.

It is because a substantial number of competitors who decline to sell "break and take" candy for these reasons, are injured, principally through the loss of trade to those manufacturers who, like respondent, do sell "break and take" packages, that the Commission regards the sale of candy in this manner as reprehensible, and "unfair" within the meaning of Section 5. Persons engaged in trade should not be compelled, in order to meet the competition of others, even though the latter be in the majority, to employ a practice the purpose of which is to take advantage of the cupidity and gambling instincts of children, or to contribute, by the sale of "break and take" packages, to the violation of the laws of the several States, or to the demoralization of competition in the industry.

It does not matter that respondent sells only full assortments and that the lottery is operated by the retailer. Respondent arranges its assortments in a manner which is intended to, and does, enable its retail customers to resell its candy by lot or chance, thus increasing its sales at the expense of its competitors who do not sell "break and take" candy. *Federal Trade Commission* v. *Winsted Hosiery Company*, 258 U.S. 483, 494. The fact that the sale of "break and take" candy is widespread in the industry

is not conclusive, because the *Winsted* case held also (pp. 493–494) that the widespread use of a practice does not prevent its use being an unfair method of competition where the practice is inherently unfair.

II. The findings of fact of the Commission, and the evidence, clearly establish that the sale of "break and take" candy is a method of competition within the meaning of Section 5. They show that the effect of the sale of "break and take" packages is to divert trade from a substantial number of competitors who decline to sell such packages.

III. The Commission's proceeding is in the public interest, for the reason, principally, that it appears that the entire industry is concerned. The public is interested also because the practice complained of is one calculated to take unfair advantage of children.

ARGUMENT

I

THE METHOD OF COMPETITION INVOLVED IN THE SALE BY RESPONDENT OF "BREAK AND TAKE" CANDY IS, UNDER THE CIRCUMSTANCES SET FORTH IN THE FINDINGS OF FACT OF THE COMMISSION, "UNFAIR" WITHIN THE MEANING OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

There are three requisites of a valid order of the Commission under Section 5 of the Federal Trade Commission Act: (1) the methods complained of must be methods of competition; (2) they must be "unfair"; and (3) the Commission's proceeding to

prevent their use must be in the public interest. *Federal Trade Commission* v. *Raladam Company*, 283 U.S. 643, 646–647; *Federal Trade Commission* v. *Royal Milling Company*, 288 U.S. 212, 216. The existence in this case of the first and third of these requisites is considered hereinafter (*infra*, pp. 37–40). It is proposed to show at this point that the methods complained of are unfair.

The decision of the court below appears to have been rested on the ground that the sale of "break and take" candy by respondent was not shown to be unfair within the meaning of Section 5. It is apparent from its opinion that, in reaching this conclusion, the court relied largely upon the decision of this Court in *Federal Trade Commission* v. *Gratz*,[9] 253 U.S. 421, and particularly upon the following statement of the Court as to the meaning of the words "unfair methods of competition" (p. 427):

> They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly.

---

[9] That case involved the practice on the part of the respondent of refusing to sell steel ties unless the purchaser agreed to take a corresponding amount of jute bagging. The Court held that the practice of "tying" was not inherently unfair and that, in the absence of further facts, a complaint charging merely the use of this practice did not state a case under Section 5.

The court below expressed the view that respondent's acts did not tend to hinder competition because, "Whatever they did, their competitors could do." Answering the contention that respondent's practices are unfair methods because they constitute a breach of good morals, the court said that, "there is nothing in the case to show deception, fraud, or bad faith" affecting respondent's competitors or the ultimate consumer. It is submitted that there is no warrant for such a narrow application of the decision in the *Gratz* case, and that the court below failed to grasp the true meaning and intent of the statement just quoted from the Court's opinion in that case.

Clearly, the fact that competitors are free to adopt the same practice is no indication that that practice does not have the tendency to hinder competition. It will be shown (*infra*, pp. 27–34) that the sale of "break and take" candy by respondent and others not only has the tendency to hinder, but does in fact hinder, competition in the penny candy industry. The court below also appears to have overlooked the decision of this Court in *Federal Trade Commission* v. *Winsted Hosiery Company*, 258 U.S. 483, 493, where this Court held that, if the methods complained of are inherently unfair, it is no defense to the Commission's proceeding that honest competitors may protect their trade by also resorting to similar methods. It is the Commission's view that the methods complained of in this case are inherently unfair.

It will be shown, further, that the practices here involved are opposed to good morals because characterized by bad faith, and, therefore, are "unfair" within the decision in the *Gratz* case. In any case, the enumeration in that case, "deception, bad faith, fraud, or oppression," was not intended to be exhaustive, any more than the list contained in *Federal Trade Commission* v. *Klesner*, 280 U.S. 19, 28, of the ways in which a case may be in the public interest, was intended to be exclusive. See *Federal Trade Commission* v. *Royal Milling Company*, 288 U.S. 212, 216, *supra*. If this is not clearly apparent upon the face of the opinion in the *Gratz* case, the history of Section 5 leaves no doubt in this respect. There is nothing in the *Gratz* case which will prevent the Court from examining anew the legislative history of Section 5.

It is proposed to consider first the origin of the words "unfair methods of competition", to show their intended scope. The grounds upon which the Commission decided that the sale of "break and take" candy is "unfair" will then be set forth. This will be followed by a brief consideration of certain contentions made by respondent in the court below, which were not noticed by that court, but which may again be urged here.

The Commission contends that the words "unfair methods of competition" were selected by Congress with the express purpose of providing a broad, flexible, all-inclusive standard. That they are not to be limited to particular classes of competitive

practices is demonstrated by the reports of the Congressional Committees made prior to the passage of the Act. The report of the House Conference Committee states (H.Rep. No. 1142, p. 19, 63d Cong., 2d Sess.):

> It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task.

The Senate Committee reported (Sen. Rep. No. 597, p. 13, 63d Cong., 2d Sess.):

> The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason, as stated by one of the representatives of the Illinois Manufacturers' Association, that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.

This Court pointed out in *Federal Trade Commission* v. *Raladam Company*, 283 U.S. 643, 648, *supra*, that the bill which became the Federal Trade Commission Act originally declared "unfair competiton"

to be unlawful, and it was because these words, which had a settled meaning at common law, were thought to be too narrow, that the words "unfair methods of competition" were substituted. The Court stated that the phrase "unfair methods of competition" belongs "to that class of phrases which do not admit of precise definition, but the meaning and application of which must be arrived at by what this Court elsewhere has called 'the gradual process of judicial inclusion and exclusion.' *Davidson* v. *New Orleans*, 96 U.S. 97, 104."

Notwithstanding, therefore, that, apart from cases involving restraint of trade, the greater number of orders of the Commission which have been sustained in the courts, have happened to involve the element of deception in its strict sense, nevertheless, the Commission is not limited by precedent in considering whether a particular practice constitutes an unfair method of competition within the meaning of the Act. It must consider each case upon its facts, and this Court will ultimately determine, upon the facts found by the Commission which are supported by evidence, whether the Commission was justified in concluding that the practices complained of fall within the statute. *Federal Trade Commission* v. *Beech-Nut Packing Company*, 257 U.S. 441, 453.

It is not contended that every practice which business men may regard as unethical is rendered unfair by Section 5. Whether a particular practice is merely unethical or is "unfair" is a question of judgment, to be exercised by the Commission in the

first instance, subject to review by the courts, having regard to the broad purpose of the statute, namely, to maintain free and fair competition.

This Court stated in *Federal Trade Commission* v. *Sinclair Refining Company*, 261 U.S. 463, 475–476, that the Commission

> has no general authority to compel competitors to a common level, to interfere with ordinary business methods or to prescribe arbitrary standards for those engaged in the conflict for advantage called competition. The great purpose of both statutes [the Federal Trade Commission Act and the Clayton Act] was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain.

To the same effect is the dictum in the case of *Northam Warren Corporation* v. *Federal Trade Commission*, 59 F. (2d) 196, 198 (C.C.A. 2d),[10] relied upon by the court below, that the Federal Trade Commission Act "does not purport to establish a decalogue of good business manners or morals." The Commission does not quarrel with this. Its position is that the sale by respondent of "break and take" candy does not involve merely a question of business

[10] Although the court below seemed to place some reliance on that case, the facts in that case are hardly pertinent to the questions here involved. The Commission's order there was directed against the use of testimonial advertising in which the testimonials themselves were truthful, but there was a failure to disclose that they were paid for. The court held that the public was not misled by this, because, "It is doubtful if the public is gullible enough to believe that such testimonials are given without compensation."

ethics or good business manners, but, as a method of competition, is reprehensible, and is, therefore, clearly unfair within the meaning of Section 5. It is contended that the large number of competitors who decline to employ lottery devices in order to further their sales of penny candy are not merely excessively conscientious. It cannot be said that they have their own superior moral sense to blame, if, as a result of their attitude, trade is diverted from them to respondent and other manufacturers who do not hesitate to sell their candy for resale by the "break and take" method. It is the Commission's view, on the contrary, that for reasons which will presently be made to appear, the competitors who decline to sell "break and take" candy are clearly justified in their attitude, and they, together with those competitors who, while they do sell this kind of candy, would prefer not to do so, but find it necessary, in order to meet the competition of others who sell lottery assortments, are entitled to be afforded the protection of the Federal Trade Commission Act.

The reasons why some competitors decline to sell "break and take" packages, which are also the grounds on which the Commission considers their sale by respondents to be an unfair method of competition, are: (1) that the principal, if not the sole, sales virtue of the "break and take" method of selling candy is in its appeal to the cupidity and gambling instincts of children, who are the principal purchasers of this candy, and that it is, therefore, calculated to take unfair advantage of children;

(2) that the sale of candy by the "break and take" method is a sale by lot or chance, and this is contrary to public policy and in violation of the lottery statutes in many, if not all, of the States; and (3) that the use of lottery devices in the sale of candy tends to demoralization of the candy industry, because it promotes competition in lottery devices, rather than in candy.

That the "break and take" method is employed because of its appeal to the gambling instincts of children is made clear from the Commission's findings (*supra*, pp. 7, 8) and the evidence (*supra*, pp. 13, 15–16). It appears that "break and take" candy is sold at retail mostly by small dealers whose shops are located near schools and attract the trade of school children. (*Supra*, pp. 7–8.) When both "straight" goods and "break and take" packages are displayed side by side, the child will purchase "break and take" candy in preference to the other, because of the possibility of winning a premium or prize. (*Supra*, p. 8.) The Commission found that (Par. Thirteen, R. 22):

> the children almost without exception purchase the candy which offers a chance to win a prize or premium rather than candy which does not have a lottery or gaming feature in connection with its sale, irrespective of the difference in size of the pieces, or the difference in quality of the two types of candy.

As this finding indicates, the preference of a child for the candy with the lottery feature is not the result of any deliberate weighing of the comparative value of the two kinds of candy. The court below assumed

the contrary, ignoring the evidence and the Commission's findings, when it said that although the child knows, when he purchases a piece of "break and take" candy, that the quantity he receives is relatively less than if no prize were given, he is satisfied to deprive himself of the difference in bulk in exchange for the opportunity to obtain a prize. (R. 375–376.) It is clear, however, that the child does not stop to reason, but is impelled to purchase the lottery candy by the hope of obtaining something for nothing.

It may be noted that the pieces of candy in the "break and take" packages are invariably either smaller in size or poorer in quality than the corresponding pieces of "straight" goods candy. (*Supra*, p. 6.) In the case of respondent's "break and take" goods, the pieces are smaller in size than its "straight" goods candy (*Ibid.*) If the child stopped to reason, i.e., to consider his chances of winning a premium or prize, his preference for the "break and take" candy might disappear. Of respondent's "break and take" assortments, it appears that in the "Chocolate Penny Men" assortment, only 4 out of 120 pieces of candy in the package contain pennies, so that the child has but one chance out of 30 of winnng a premium. (*Supra*, p. 4.) In the "School Days 200" assortment, only 20 out of 200 pieces of candy have pink or chocolate centers, and carry prizes. (*Supra*, p. 5.) Furthermore, the display cards accompanying these two assortments give no indication of the number of pieces which carry premiums or prizes, or of the

chances which a child has of winning a premium or prize.[11] It is readily apparent, therefore, that the children act blindly in preferring the "break and take" candy over the "straight" goods. As one witness testified (*supra*, p. 15), "Reason would prompt them to take the better value for every penny that they spend, but the gambling instinct prompts them to try to get something for nothing." In some instances chidren go so far as to purchase a piece of candy, break it open, and if the center is not of a prize-winning color, throw it away and purchase other pieces until a prize is obtained or their money is gone. In other instances children who win a prize or premium give it away to other children, and continue to make further purchases. (R. 20.)

The general prevalence of lottery statutes in this country indicates ample recognition of the fact that the gambling instinct is strong, even in adults. A child particularly may not be expected to stop to consider the value of his bargain when confronted with the apparent opportunity to win a "free prize." In *Champion* v. *Ames*, 188 U.S. 321, sustaining the constitutionality of a Federal lottery statute, this

[11] The court below was not justified, therefore, in stating that the display cards accompanying respondent's merchandise "contain a complete, fair and accurate description of the sales plans." It is true that in the one assortment described as "1, 2, 3, Big Chief 60s", the display card reveals that 10 of the bars sell for 1¢ each, 10 for 2¢ each, and 40 for 3¢ each. (*Supra*, pp. 4–5.) However, there is no reason to believe from the evidence that even where the number of chances of winning a premium are disclosed in this manner, the child gives any consideration thereto.

Court (p. 358) referred to the lottery business as an evil of "appalling character." In *Brooks* v. *United States*, 267 U.S. 432, 437, this Court stated that the object of the statute that was sustained in the *Ames* case was, by prohibiting the carriage of lottery tickets in interstate commerce, to prevent the demoralization, "through a spread of the gambling habit," of individuals who were likely to purchase them. For these reasons, the use of lottery devices to induce purchases by children takes unfair advantage of the children, and such a practice would seem, therefore, to be opposed to good morals because characterized by bad faith, as that term is used in the *Gratz* case, *supra*.

Many of the candy manufacturers who decline to sell "break and take" packages refrain from doing so because of the illegality believed to be involved in the use of lottery devices. (*Supra*, p. 14.) The Commission found that the sale and distribution of candy by lot or chance is against the public policy of many of the States, some of which have laws making the use of lotteries and gaming devices penal offenses (*supra*, p. 8.) There are, in fact, lottery statutes in all the States.[12] The Commission found, in addition, that the sale of "break and take"

[12] Appendix B to the petition for a writ of certiorari in this case is a list of State statutes prohibiting lotteries, gift enterprises, etc.

candy at retail[13] is a sale by lot or chance and constitutes a lottery. (*Supra*, p. 8.) This finding was not questioned by the court below; similar practices have been held to be in violation of lottery statutes in several cases. For example, see *United States* v. *One Box of Tobacco, "Foot Prints"* 190 Fed. 731 (C.C.A. 4th); *United States* v. *Jefferson*, 134 Fed. 299 (C.C.W.D. Ky.); *Hull* v. *Ruggles*, 56 N.Y. 424; *State* v. *Clarke*, 33 N.H. 329; *Holoman* v. *State*, 2 Tex. Ct. App. 610; *People* v. *Runge*, 3 N.Y. Crim. Reports 85.

The third reason assigned by some competitors for preferring not to sell "break and take" packages, and one of the three grounds on which the Commission reached its conclusion in this case, is aptly presented in the dissenting opinion of Judge Woolley, where he said (R. 380):

> Differing in a way that makes the trading stamp system look almost commendable, the petitioning candymaker in this case not only entered into competition for the penny candy trade with smaller candy units, but, stepping outside of commerce, injected into its competition a gamble which has made its competitors

[13] As this finding indicates, the Commission did not proceed upon the theory that respondent is itself violating the lottery statutes, but on the theory that respondent sells its product intending that it should be resold in a manner involving lot or chance in violation of the local lottery laws and public policy. No claim is made that respondent violated the Federal lottery statutes. Section 213, Criminal Code (U.S.C., Title 18, Sec. 336); Section 237, Criminal Code (U.S.C., Title 18, Sec. 387).

> contest with it not only for the purchasing trade but for the speculating public. To sell their goods, its competitors have to compete with the petitioner not only in wares and prices but by devising and putting into practice more seductive gambling schemes. This, I think, is not commerce; it is merchandising chance instead of candy. Aside from any question of morals, I regard it unfair.

The assertion that it is merchandising chance instead of candy, is taken from the mouth of one of the witnesses in this case. (R. 306.) That the use of lottery devices will lead to competition in those devices rather than in quality or price is borne out by the Commission's finding (*supra*, p. 7) that the gambling element is more attractive to the child than the quality or the size of the piece of candy. A practice which makes competition depend, not on price, quality or service, but on the seductive character of the gambling devices employed to induce sales would seem for this reason alone to be an unfair method of competition, whether or not it is wrong to gamble, and quite aside also from the legality of such devices under State statutes.

It is the Commission's view, in short, that persons engaged in trade should not be compelled, in order to meet the competition of others, even though the latter be in the majority, to employ a practice the purpose of which is to appeal to, and to take advantage of, the cupidity and gambling instinct of children, or to contribute, by the sale of "break and take" packages, to the violation of the laws of the

several States, or to the demoralization of competition in the industry. The decision of the lower court, if allowed to stand, would have the further effect of leaving in the hands of less scrupulous manufacturers a powerful competitive weapon to be used against those whose moral convictions will not permit them to employ the practices complained of in this case, and who will, therefore, stand by and see their trade gradually diverted from them, rather than employ methods which they regard as reprehensible.

It is clear from the Commission's findings (*supra*, pp. 7–9) and the evidence (*supra*, pp. 12–14) that there are a substantial number of competitors, though they may be in the minority in the industry, who, although as a result their trade is diverted from them, decline to sell "break and take" assortments of penny candy. There are, in addition, some who would prefer not to sell "break and take" candy, but who do so, despite this preference, in order to meet competition in such candy. (*Supra*, p. 14.) It is worthy of emphasis, also, that some of those who decline to deal in "break and take" candy find that their customers purchase their entire candy needs, including "straight" goods, from competitors who do sell the "break and take" packages. (R. 134, 174, 277, 283.) Under these circumstances, it is submitted that the Commission correctly decided that the method of competition involved in the sale by respondent of "break and take" candy is unfair within the meaning of Section 5.

In the court below respondent urged that no unfairness may be charged against it, since it sells only full

assortments, and it is the retailer who sells by the "break and take" method. It was contended (1) that at the time of the employment of the sales methods in question, respondent's candy assortments were no longer in interstate commerce and were, therefore, beyond the jurisdiction of the Commission, and (2) that in any case respondent could not be held responsible for the acts of its retail customers. These arguments are founded upon a misconception of the theory upon which the Commission is proceeding. The Commission is not seeking to regulate the acts of respondent's customers, the retailers, nor to impose responsibility upon respondent therefor. Rather the Commission is seeking to prevent the respondent from unfairly increasing its sales at the expense of its competitors (i.e., those who do not sell lottery packages) by placing in the hands of its retail customers the means of accomplishing this result. In this respect this case is not unlike *Federal Trade Commission* v. *Winsted Hosiery Company*, 258 U.S. 483, *supra*, which involved an order of the Commission prohibiting the respondent, a manufacturer, from attaching misleading labels to its products. The respondent there appears to have urged that its immediate customers, retail dealers, were aware that the labels were false and they were, therefore, not deceived; and that if the ultimate customer was deceived, the retail dealers were alone responsible therefor. But this Court held (p. 494):

> The honest manufacturer's business may suffer, not merely through a competitor's deceiving his direct customer, the retailer, but

> also through the competitor's putting into the hands of the retailer an unlawful instrument, which enables the retailer to increase his own sales of the dishonest goods, thereby lessening the market for the honest product. That a person is a wrongdoer who so furnishes another with the means of consummating a fraud has long been a part of the law of unfair competition.

That case, it is true, involved deception, but the principle there applied is also applicable here. There, the retailers might, if they chose, have avoided causing any deception by removing the labels or making known their falsity. Here, the retailer may, if he chooses, sell respondent's "break and take" candy without using the lottery features.[14] However, just as in the *Winsted* case the false labels were attached for the very purpose of enabling the retailer to deceive and with the intention that he should do so, so in this case, as the Commission found (*supra*, p. 6), it was respondent's purpose, in packing its assortments in the manner previously described, that they should be resold by the retailers by lottery.

The decision in the *Winsted* case also answers the further contention of respondent based upon the widespread use of the "break and take" method in the candy industry. The Court held in that case that the widespread use of a practice does not pre-

[14] This does not apply to the "Chocolate Penny Men" assortment in which in 4 of the 120 pieces of candy a penny is concealed. (*Supra*, p. 4.).

vent its being an unfair method of competition, saying (pp. 493–494):

> The fact that misrepresentation and misdescription have become so common in the knit underwear trade that most dealers no longer accept labels at their face value does not prevent their use being an unfair method of competition. A method inherently unfair does not cease to be so because those competed against have become aware of the wrongful practice.

It is not denied that in a particular case the fact that a large number in the industry employ the practice complained of may be entitled to some weight in considering whether the practice is unfair within the meaning of the Act. *Federal Trade Commission* v. *Sinclair Refining Company*, 261 U.S. 463, 475, *supra*. Where, however, the practice complained of by the Commission is intrinsically unfair, as was the practice involved in the *Winsted* case, and as is the practice here involved, the fact that it is in widespread use in the industry does not take it out of the statute.

II

THE FINDINGS OF FACT OF THE COMMISSION AND THE EVIDENCE CLEARLY ESTABLISH THAT THE SALE OF "BREAK AND TAKE" CANDY IS A METHOD OF COMPETITION WITHIN THE MEANING OF SECTION 5

The court below did not question the fact that the sale by respondent of "break and take" candy is a method of competition within the meaning of Section 5, and the contrary cannot be successfully urged.

The Commission's findings (*supra*, pp. 7, 9), amply supported by the testimony (*supra*, pp. 12–14), show that the effect of the sale of "break and take" packages is to divert trade from competitors who decline to sell such packages. These, although a minority in the industry, are substantial in number.

Respondent sought in the court below to bring this case within the decision of this Court in the *Raladam* case, *supra*, urging that the great majority of penny candy manufacturers employ the methods complained of by the Commission. The *Raladam* case was decided, however, on the ground (pp. 652–653) that the record lacked sufficient evidence to show that *any* competitors were injured. The opinion of the Court definitely implies that if there were any substantial number of honest competitors who were injured, irrespective of whether they constituted only a small minority of all those engaged in the business, the decision would have been the other way. The Court said (pp. 647–648):

> The paramount aim of the act is the protection of the public from the evils likely to result from the destruction of competition or the restriction of it in a substantial degree, and this presupposes the existence of *some substantial competition* to be affected, since the public is not concerned in the maintenance of competition which itself is without real substance. Compare *International Shoe Company* v. *Federal Trade Commission*, 280 U.S. 291, 297–299. (Italics ours.)

Again at page 649, the Court said:

> It is obvious that the word "competition" imports the existence of present or potential competitors, and the unfair methods must be such as injuriously affect or tend thus to affect the business of these competitors—that is to say, the trader whose methods are assailed as unfair must have present or potential rivals in trade whose business will be, or is likely to be, lessened or otherwise injured.

Not only are a substantial number of competitors shown to be injured in this case, but the Commission found, also, and the evidence shows, that some of those who sell "break and take" candy have begun to do so in order to meet the competition of other manufacturers who sell such candy. (R. 19; *supra*, p. 14.) Such persons are, therefore, also affected.

III

THE ACTION OF THE COMMISSION IS TO THE INTEREST OF THE PUBLIC

There can be no question that the Commission's proceeding is in the public interest. In the court below respondent characterized this case as involving "a purely private controversy between the majority and minority candy manufacturers of the country." The fact that on respondent's own statement the entire industry is concerned, would seem sufficient without more to establish the public interest. Describing the controversy as a "purely private" one does not make it such and does not bring this case within the decision of the Court in *Federal Trade*

Commission v. *Klesner*, 280 U.S. 19, *supra*. In that case the order of the Commission involved a dispute merely between two small traders in the District of Columbia.

The public is interested not only because the entire penny candy industry is involved, but also because the practice complained of is one calculated to take unfair advantage of children, who are the principal purchasers of "break and take" candy. The practice is, therefore, equally unfair to them as to the competitors who are injured. As stated by Judge Woolley in his dissenting opinion (R. 378):

> If the methods of sale be unfair to the purchasing children, they are unfair to a part of the public, indeed to the whole of the public which purchases candy in small quantities at penny prices. If the methods of sale be unfair to competitors in the manufacture and sale of candies in the same trade, they are unfair to another part of the public. Stated crudely, there are in this case two publics, each with a different yet specific and substantial interest. To stay a wrong inflicted upon either by unfair methods of competition is clearly within the jurisdiction of the Federal Trade Commission..

Respondent made the contention in the court below that the Commission lacks jurisdiction to enforce the anti-lottery statutes. This erroneously assumes that the Commission is seeking in this proceeding to enforce those statutes, whereas the Commission rests

its case entirely upon the Federal Trade Commission Act. If the conclusion of the Commission that there are present the elements of an unfair method of competition under Section 5, is sound, the Court would not be justified in holding that section inapplicable merely because the order of the Commission would tend incidentally to aid in the enforcement of other laws, e.g., the State anti-lottery statutes, or because, if the latter statutes were rigidly enforced, this would remove the unfair competition complained of. Moreover, as previously indicated, the existence of the lottery statutes and the consequent illegality of the retail sale by the "break and take" method is not the sole ground upon which the Commission concluded that the sale of "break and take" candy is unfair. An effort has been made to show that apart from the illegality involved, the use of lottery devices is not a fair way to obtain the trade of children; and is an unfair competitive practice for the additional reason that it is injurious to competition in the candy industry. If the sale of "break and take" assortments of candy is for these reasons in fact unfair within the meaning of Section 5 it, would seem unreasonable to hold that Section 5 is, nevertheless, inapplicable merely because it also happens that the resale at retail of "break and take" candy runs counter to the lottery statutes of the several States.

CONCLUSION

All the elements of a case under Section 5 are present. The methods complained of are "unfair." A substantial number of honest competitors are in-

jured, and the methods complained of are, therefore, methods of competition. The Commission's proceeding is in the public interest. It is respectfully submitted that the decree below should be reversed, with directions to affirm the Commission's order.

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APPENDIX

Section 5 of the Federal Trade Commission Act, c. 311, 38 Stat. 717, 719 (U.S. Code, Title 15, Sec. 45), provides, *inter alia:*

> That unfair methods of competition in commerce are hereby declared unlawful.
>
> The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.
>
> Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the commission, to intervene and

appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall

have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall cer-

tify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.

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